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NURUL HUSNA MUHAMMAD HAFIZ & ANOR v. KERAJAAN MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
VAZEER ALAM MYDIN MEERA JC
[SUIT NO: 21NCVC-266-12-2012]
28 AUGUST 2014

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CIVIL PROCEDURE: *Discovery – Inspection of documents – Rights of patient to obtain copies of medical records – Whether physician or hospital may refuse to disclose medical records to patient – Whether patient must first obtain court order to get access to medical records*

C

TORT: *Negligence – Damages – Whether court can only award damages in monetary terms – Whether quantum of damages can be reduced based on tortfeasor's promise to provide free medical treatment for victim – Whether quantum of damages can be reduced where victim is entitled to free medical care*

D

TORT: *Negligence – Medical negligence – Plaintiff suffering irreversible brain damage at birth due to negligence of medical staff – Damages – Whether plaintiff must produce complete set of bills and receipts to claim special damages – Claim for special food and nutritional supplements – Claim for diapers – Claim for traditional massage therapy – Claim for gratuitous care by family members – Determining multiplier and multiplicand for future cost of care – Claim for maid, multi-purpose vehicle and disabled-friendly home*

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The first plaintiff ('Nurul Husna') suffered severe and irreversible brain damage at birth on 22 July 2005 at the Selayang Hospital, owned and operated by the Government of Malaysia ('the first defendant') through the Ministry of Health. The second plaintiff was the mother of Nurul Husna, a radiologist employed by the Malaysian government. The plaintiffs claimed that the severe and irreversible brain damage of the first plaintiff was caused by the negligence of the second to the 30th defendants (the doctors and nurses who attended to the delivery of the first plaintiff and post natal care of the plaintiffs) and that the first defendant was vicariously liable. The plaintiff alleged that as a result of the severe and irreversible brain damage, the first plaintiff was suffering from spastic quadriplegia, cerebral palsy and profound global development delay. At the outset, the defendants denied liability. The defendants also refused to produce the medical records even though the plaintiffs' solicitors had written to Selayang Hospital requesting for copies of the same. The plaintiffs' application for an order for discovery and production of a copy of an internal inquiry report was allowed. Following the order of discovery and the production of the internal inquiry report, the defendants had elected to not dispute liability but refused to record a formal admission of liability. As a result, the court allowed the plaintiffs' application pursuant to O. 27 r. 3 of the Rules of Court 2012 for judgment to be pronounced against the defendants in respect of liability and for

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damages to be assessed. Nurul Husna's physical and mental condition meant that she will not be employable. Her parents will therefore have to continue to provide for her throughout her life.

Held:

(1) The ownership of a patient's medical record vests with the physician or hospital as the case may be. However, the physician or hospital must deal with the medical records in the best interest of the patient. The patient has an innominate and qualified right of access to his medical records and there is a corresponding general duty on the part of the physician or hospital to disclose the patient's medical records to the patient, his agents, medical advisers or legal advisers. The physician or hospital may refuse to disclose partly or wholly the medical records to the patient in certain limited circumstances, such as, but not limited to, situations when such disclosure would be detrimental or prejudicial to the patient's health in that the information is likely to cause serious harm to the physical or mental health of the patient or of any other individual contained in the medical records; or when such disclosure would divulge information relating to or provided by an individual, other than the patient, who could be identified from that information. When the circumstances giving rise to such qualification for refusal to disclose does not present itself, and when the request for disclosure is reasonable, having regard to all the circumstances, the physician or hospital shall give copies of the medical records to the patient upon payment of reasonable copying charges. (para 21)

(2) Reliance of private healthcare operators on reg. 44(2) of the Private Healthcare Facilities and Services (Private Hospital and Other Private Healthcare Facilities) Regulations 2006 to withhold patient's access to medical records until the patient obtains a court order is entirely misconceived. There is no requirement in law that the patient first obtain a court order to get access to his medical records. (para 22)

(3) It is trite that in a negligence claim, the court can award damages only in monetary terms. The court cannot make an award for any specific relief against the defendants in a tortious claim for damages, for example, to order the tortfeasor to undertake repairs, provide medical treatment, supply goods and services. (para 28)

(4) A reduction in the quantum of damage based on the promise from the tortfeasor to provide free medical treatment to the victim of the tort is contrary to legal principle. Nor should damages be reduced by virtue of any statutory duty of the government to provide medical care to the first plaintiff by virtue of her incapacity. The first plaintiff's entitlement to compensatory damages for the negligence of the defendants could not be reduced or diminished even though the second

plaintiff, and the first plaintiff as child and dependent of the second plaintiff, were entitled to free medical care by virtue of the second plaintiff's contract of employment with the government and/or by virtue of the first plaintiff's status as a disabled person ('orang kurang upaya') who is afforded free medical care in government hospitals. (para 29)

(5) Nurul Husna's food had to be specially prepared. In addition, Nurul Husna needed to be given vitamins and nutritional supplements to increase her resistance to diseases. A sum of RM44,500 was allowed for this head of claim. It was unreasonable to expect the plaintiffs to collect bills and receipts and filing them away with a view to bringing a claim especially when the defendants had hidden their culpability in the treatment and management provided to Nurul Husna. (para 38)

(6) Nurul Husna was both bowel and bladder incontinent and required about 10-15 diapers a day in addition to wipes and creams. This claim was supported by some bills and receipts, though not complete. The sum claimed was reasonable. The fact that the plaintiffs could not give a complete set of bills and receipts for this item could not be a reason to lower the claim. (para 43)

(7) Nurul Husna was taken for traditional massage therapy. Associate Professor Dr Lydia (PW3) had mentioned in her expert report that complementary and alternative medical therapy brings benefit to persons suffering from cerebral palsy. The claim of RM5,340 under this head was thus reasonable. (para 46)

(8) Gratuitous care of disabled persons by family members can be quantified on a commercial basis and compensated in damages. Besides Nurul Husna's parents, other family members such as her grandparents also provide care. A sum of RM500 a month was reasonable for this head of claim; *(Tan Cheong Poh & Anor v. Teoh Ah Keow,* refd). (para 54)

(9) The multiplier for future costs of care was derived by having regard to the life expectancy of Nurul Husna. Nurul Husna's life expectancy was estimated to be 35 years. Thus, the calculation of the multiplier would be: 35 (life expectancy) – 8 (current age) - 1/3 for contingencies = 18 years. (paras 88 & 89)

(10) The plaintiffs should not be left stranded if a single maid resigns, absconds or falls ill. Nurul Husna's parents should be freed of this burden so as to allow them to concentrate on their respective careers and on their other child. It would also be best that two maids take care of Nurul Husna on a roster basis so that it does not become too strenuous for the maids. This would also eliminate short turnover of maids or the incidence of them absconding; *(Raja Zam Zam v. Vaithiyanathan*, refd). (para 96)

(11) Nurul Husna would require a multi-purpose vehicle that had been modified to accommodate Nurul Husna in her wheelchair and for her carers to be seated as well. The cost of this specialised vehicle with three renewals was allowed but with a 1/3 deduction as the renewals would result in the previous vehicle having a trade-in residual value. (para 101)

(12) Nurul Husna would need a disabled-friendly home. The plaintiffs' apartment could be renovated at a cost of RM100,000 to make it wheel chair and disable friendly for Nurul Husna's everyday needs. A sum of RM100,000 was allowed under this head. (para 106)

Case(s) referred to:

ABDA Airfreight Sdn Bhd v. Sistem Penerbangan Malaysia Bhd [2001] 8 CLJ 1 HC ***(refd)***
B A Rao & Ors v. Sapuran Kaur & Anor [1978] 1 LNS 14 FC ***(refd)***
Bolitho v. City Hackney Health Authority [1997] 4 All ER 771 ***(refd)***
Gleneagles Hospital (KL) Sdn Bhd v. Chung Chu Yin & Ors And Another Appeal [2013] 8 CLJ 449 CA ***(foll)***
Hawkins v. New Mendip Engineering Ltd [1966] 3 All ER 228 CA ***(refd)***
Jag Singh v. Toong Fong Omnibus Co Ltd [1964] 1 LNS 50 ***(refd)***
Lim Poh Choo v. Camden and Islington Area Health Authority [1979] 2 All ER 910 ***(refd)***
McInerney v. MacDonald [1990] 66 DLR (4th) 736 ***(refd)***
Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 HC ***(refd)***
Peters v. East Midlands Strategic Health Authority And Others [2009] LS Law Med 229 ***(refd)***
Raja Zam Zam v. Vaithiyanathan [1965] 1 LNS 145 HC ***(refd)***
Regina v. Mid Glamorgan Family Health Services Authority and Another [1995] 1 WLR 110 ***(refd)***
Schrump Et Al v. Koot Et Al Lexsee (1977) 18 OR (2d) 337 ***(refd)***
Takong Tabari v. Government of Sarawak & Ors & Another Appeal [1998] 4 CLJ 589 CA ***(refd)***
Tan Cheong Poh & Anor v. Teoh Ah Keow [1996] 3 CLJ 665 CA ***(refd)***
Yang Salbiah & Anor v. Jamil Harun [1981] 1 LNS 106 FC ***(foll)***

Legislation referred to:

Evidence Act 1950, s. 123
Private Healthcare Facilities and Services (Private Hospital and Other Private Healthcare Facilities) Regulations 2006, reg. 44(2)
Rules of Court 2012, O. 24 r. 7A, O. 27 r. 3

Access to Health Records Act 1990 [UK], ss. 3, 4, 5

For the plaintiffs - MS Dhillon (KB Karthi with him); M/s PS Ranjan & Co
For the defendants - Zaliha Mohd Janis (Najiah Zaimah Aris with her); AG's Chambers

Reported by Amutha Suppayah

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JUDGMENT

Vazeer Alam Mydin Meera JC:

[1] The first plaintiff (Nurul Husna binti Muhammad Hafiz) suffered severe and irreversible brain damage at birth on 22 July 2005 at the Selayang B Hospital, owned an operated by the Government of Malaysia ('the first defendant') through the Ministry of Health. The second plaintiff is the mother of Nurul Husna.

[2] The plaintiffs' claim that the severe and irreversible brain damage of the first plaintiff was caused by the negligence of the second to the C 30th defendants (the doctors and nurses who attended to the delivery of the first plaintiff and post natal care of the plaintiffs) and that the first defendant was vicariously liable. The plaintiffs allege that as a result of the severe and irreversible brain damage, the first plaintiff is suffering from spastic quadriplegia, cerebral palsy and profound global development delay. In the D premise, the plaintiffs' claim damages, interest and cost.

[3] At the outset the defendants denied liability and filed defence challenging the plaintiffs' claim.

[4] The defendants also refused to produce the plaintiffs' medical records even though the plaintiffs' solicitors had first written to Selayang Hospital on E 24 November 2011 requesting for copies of the same.

[5] The plaintiffs then filed a notice of application (encl. 8) seeking an order for discovery and production of a copy of an internal inquiry report referred to in para. 3 of the defence together with the notes of proceedings of the inquiry. The plaintiffs also sought an order that the defendants within F seven days of the order serve on the plaintiffs' list of documents, an affidavit verifying list of documents and copies of the documents referred to in the list of documents.

[6] The defendants vehemently objected to encl. 8 primarily on grounds G of affairs of state privilege as provided in s. 123 of the Evidence Act. Counsel for the plaintiffs argued on strength of the pronouncement of the Federal Court in *BA Rao & Ors v. Sapuran Kaur & Anor* [1978] 1 LNS 14 that the internal inquiry report and all other medical records of the plaintiffs ought to be produced by the defendants as these documents do not have any H connection with affairs of the state and as such the privilege from disclosure under s. 123 of the Evidence Act does not arise.

[7] After having heard full arguments, I accepted the submissions of counsel of the plaintiffs and allowed the plaintiffs' aforesaid application in encl. 8 on 19 April 2013 and ordered production of the internal inquiry I report and the plaintiffs' medical records and further ordered that the defendants file an affidavit verifying the documents.

[8] Following that order of discovery, the defendants produced and served copies of the plaintiffs' medical records as well as a copy of a Ministry of Health inquiry report relating to the first plaintiff's birth at the Selayang Hospital on 22 July 2005 and her subsequent medical care at the Selayang Hospital. This report entitled "Independent Inquiry Committee Report" contains the following conclusion:

> Conclusion
>
> The members of the external board of inquiry found that there was substandard care in the management of second stage of labour. There was a delay in the delivery of the baby; due to inability to appreciate the severity of the problem because the Medical Officer did not review the CTG. Therefore the decision of mode of delivery was not decided and the intervention was not initiated. The injury to the baby was probably contributed by poor management of patient *intrapartum* as there was failure to review patient and failure of detection of abnormal CTG.

[9] It is worth noting that despite this conclusion on the defendants' culpability by the Health Ministry's external board of inquiry, the defendants denied liability in their defence and there was an attempt by the defendants' to exculpate themselves through a rather contradictory and self-serving medical report dated 15 October 2012 prepared by one Dr Mohamed Roslan Abd Halim the head of obstetrics and gynaecology of Selayang Hospital where he concludes as follows:

> Conclusion
>
> The poor outcome of the baby was unpredictable and unexpected. The management during the antenatal period and during the *intrapartum* were within the standard practice.

[10] In any event, following the order of discovery and the production of the damning internal inquiry report, the learned Senior Federal Counsel appearing for the defendants informed the court on 26 July 2013 that the defendants had elected to not dispute liability in respect of the plaintiffs' claim of negligence. However, the learned Senior Federal Counsel refused to record a formal admission of liability.

[11] As a result of that, the plaintiffs filed an application (encl. 21) pursuant to O. 27 r. 3 of the Rules of Court 2012 ('ROC') for judgment to be pronounced against the defendants in respect of liability and for damages to be assessed. I granted order in terms of encl. 21 on 11 October 2013 and judgment on liability was entered against the defendants with an order for damages to be assessed.

The Patient's Rights Of Access To Medical Records

[12] Before I deal with the issue of quantum of damages, I would like to briefly touch on the issue of a patient's right of access to his medical records, which was the subject matter of encl. 8. Of late, there has been a marked

increase in the number of suits or applications filed by patients for access to their medical records. In the present case the defendants too had refused to make pre-action discovery of the plaintiffs' medical records.

[13] The prevalent common practice among medical professionals and hospitals is to refuse to give copies of patient's medical records unless ordered by the court to do so. This has necessitated the filing of applications by patients seeking court's intervention to order production of the medical records. In most cases, when the application comes for hearing, the respondent throws in the towel and agrees to produce copies of the medical records sought. In a handful of cases, there is resistance and the court determines the issue to order production. This guarded conduct of the medical professionals and hospitals has caused patients to incur avoidable costs and delays by filing originating processes for an order for discovery of their medical records.

[14] This may be an opportune moment for me to revisit and reiterate the principles governing the rights of a patient to access his medical records. The Malaysian Medical Council ('MMC'), the statutory body corporate established under the Medical Act 1971 to regulate the medical profession, recognises that patients have a right of access to their medical records. This recognition is embodied in the guideline of the Malaysian Medical Council, MMC guideline 002/2006 – medical records and medical reports ('the guideline'). The foreword to the guideline penned by Tan Sri Datuk Dr Hj Mohamed Ismail Merican, the then President of the MMC, states that:

> The guidelines are designed to complement, and should be read in conjunction with, the Medical Act and Regulations, Code of Professional Conduct of the Malaysian Medical Council and other guidelines issued by the Council or any related organisations, as well as any statute or statutory provisions in force and all related statutory instruments or orders made pursuant thereto.
>
> This guideline on the medical records and medical reports has been prepared with careful attention to details, cognisant of the current international stand on the subject. The draft has been reviewed numerous times by the Malaysian Medical Council and includes invaluable responses from individuals, organisations and professional bodies in the country, before formal adoption by the Council.

[15] It is evident that the guideline was formulated after an extensive consultation process involving a broad spectrum of stakeholders in the medical services sector. And though the guideline may not have the force of law in that these are not regulations made pursuant to the Medical Act, 1971, it nevertheless has high persuasive authority in that the guideline was adopted by the MMC on 14 November 2006 as general guidance for its members "on matters of professional ethics, codes of professional conduct and medical practice in general". In effect the guideline is a guide by peers for peers and a code of ethics and conduct. Since the guideline forms part of professional

ethics and conduct of medical professionals, the breach of the guideline and any unreasonable denial of a patient's right of access to his medical records may be subject to disciplinary sanction by the MMC.

[16] There are several clauses in the guideline that needs particular attention. Clause 1.7 of the guideline relates to the patient's right to medical records and states that:

> 1.7. Patient's Expectations and Rights to Medical Records
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> It is generally accepted that the patient should:
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> (i) Have access to records containing information about his/her medical condition for legitimate purpose and in good faith;
>
> (ii) Know what personal information is recorded,
>
> (iii) Expect the records are accurate, and
>
> (iv) Know who has access to his/her personal information.
>
> There is evidence that increased access to medical records has provided patients with better understanding of their illness as well as having a positive impact on patient-doctor relationship.
>
> While patients have right of such access to their medical records, they may be permitted to inform the practitioner of any factual errors in the personal patient information. They should not seek to change any entries made by the practitioner in the course of consultation, diagnosis and management as these are made by the practitioner based on his clinical judgment.

[17] And cl. 1.15 of the guidelines on access to medical records provides that:

> 1.15. Access to Medical Records
>
> The patient may be entitled to access medical records as part of the contract between him/her and the medical practitioner, for various purposes, ranging from need to seek second opinion, to seek further treatment elsewhere, or for litigation. This privilege is also extended with the patient's consent to the patient's appointed agents.
>
> Normally, medical practitioners and persons in charge of healthcare facilities and services should not object to the release of results and reports of the patient's laboratory investigations, X-rays and scans, and other such diagnostic tools, which the patient would have paid for personally or through insurance.
>
> Medical practitioners and persons in charge of healthcare facilities and services are generally expected to cooperate and release all parts of the medical records, or certified true copies of the records, when so requested by the patient.
>
> If the patient's or agents' request for access is refused after all other avenues have been explored, a patient may then resort to civil action. Legal proceedings are commenced by issuing a writ to permit the process of 'order of discovery' to proceed after which documents maybe subpoenaed.

When medical records are taken out from the private healthcare facility or service whether by a court order, or mutual consent, a copy of the records shall be retained by the private healthcare facility or service and the original records shall be returned to the private healthcare facility or service at the end of the proceedings for which the records were directed to be procured.

The patient, and/or his appointed agent/officer, on written request, is entitled to a written report on the care given to the patient as recorded in the medical record, and relevant copies of their medical records. The healthcare facility is not liable for any interpretation or analysis of the medical record made by a third party.

The withholding of information of the care, diagnosis, treatment and advice given to the patient, and relevant copies of the medical records, is unethical.

[18] Further, cl. 1.17 of the guideline deals with instances where the practitioner may deny disclosure of the medical records and it states that:

1.17. Denial of Disclosure

The practitioner may deny disclosure of the contents of the medical record, if in his considered opinion, the contents if released may be detrimental or disparaging to the patient, or any other individual, or liable to cause serious harm to the patient's mental or physical health or endanger his life. The practitioner may also deny disclosure particularly if the patient is deceased. In such instances, the practitioner should be able to justify his decision to deny disclosure.

The practitioner may deny disclosure if there is no written consent from the patient, or his legal next-of-kin or guardian, for release of the contents of the Medical Record to a third party.

[19] When the guideline is scrutinised the position adopted therein by the MMC is similar to the common law position in England and Wales prior to the coming into force of the Access to Health Act 1990. The common law recognised the patient's general right of access to medical records. However, that right is not absolute. The courts whilst recognising this general right have also recognised circumstances when the doctor or hospital may refuse to disclose the medical records. Thus, in common law exceptions for non-disclosure are set out rather than exceptions for disclosure, underscoring that the right of patients and their agents to access medical records is innominate in nature. This principle was well stated by the English Court of Appeal in *Regina v. Mid Glamorgan Family Health Services Authority and Another* [1995] 1 WLR 110 where Evans LJ held as follows:

In my judgment, there is no good reason for doubting either that a right of access does exist or that it is qualified to that extent at least. The record is made for two purposes which are relevant here: first, to provide part of the medical history of the patient, for the benefit of the same doctor or his successors in the future; and, secondly, to provide a record of diagnosis and treatment in case of future inquiry or dispute. *Those purposes would be*

frustrated if there was no duty to disclose the records to medical advisers or to the patient himself, or his legal advisers, if they were required in connection with a later claim. Nor can the duty to disclose for medical purposes be limited, in my judgment, to future medical advisers. There could well be a case where the patient called for them in order to be able to give them to a future doctor as yet unidentified, eg. in case of accident whilst travelling abroad.

(emphasis added)

And Sir Roger Parker added:

(1) *I regard as untenable the proposition that, at common law, a doctor or health authority has an absolute property in medical records of a patient, if this means, which it appears to do, that either could make what use of them he or it chose.* Information given to a doctor by a patient or a third party is given in confidence and the absolute property rights are therefore necessarily qualified by the obligations arising out of that situation. (2) *I regard as equally untenable the proposition that by reason of a "right of self-determination" a patient has an unfettered right of access to his medical records at all times and in all circumstances; indeed it is accepted for the applicant that this cannot be so.* (3) *In my view the circumstances in which a patient or former patient is entitled to demand access to his medical history as set out in the records will be infinitely various, and it is neither desirable nor possible for this or any court to attempt to set out the scope of the duty to afford access or, its obverse, the scope of the patient's rights to demand access. Each case must depend on its own facts.* (4) There can, I think, be no doubt, for example, that a doctor should, if requested by the patient, or perhaps by a patient's doctor for the time being, afford access to such doctor but not necessarily to the entire contents of the records. There may, however, be circumstances when direct access to the records or some part of them should be given to the patient himself. If, for example, he is about to emigrate and his condition is such that he might need treatment before he can nominate a successor doctor, it would, it seems to me, be probable that the doctor with the records would be obliged either to give access to the records or to provide his departing patient with a letter giving the information necessary to enable a doctor, faced with his collapse, eg, on board ship, to treat him properly.

(emphasis added)

In England, that common law innominate right is now statutorily embodied in the Access to Health Records Act 1990. Section 3 of that Act gives the patient or his agent a *prima facie* right of access to medical records whilst s. 4 and s. 5 provide for situations where the right of access may be wholly or partially excluded.

[20] In Canada the position is not too dissimilar to that of the English common law. The New Brunswick Court of Appeal in *McInerney v. MacDonald* [1990] 66 DLR (4th) 736 at 744 held that:

The physician-patient relationship also gives rise to the physician's duty to make proper disclosure of information to the patient ... The appellant concedes that a patient has a right to be advised about the information concerning his or her health in the physician's medical record. *In my view*

A *however, the fiducial qualities of the relationship extend the physician's duty beyond this to include the obligation to grant access to the information the doctor uses in administering treatment*. This approach has been taken by one stream of American cases. In *Emmet v. Eastern Dispensary and Casualty Hospital*, 396 F2d 931 (DC Cir 1967) Robinson J held, at p. 935, that the fiducial qualities of the physician-patient relationship imposes a duty on the B physician "to reveal to the patient that which in his best interests it is important that he should know". Thus, in that case, the decedent patient's son was entitled to inspect the decedent's medical records. Similarly, in *Cannell v. Medical and Surgical Clinic*, 315 NE2d 278 (Ill App Ct 1974), the court, having referred to the decision in *Emmet*, held that the fiducial qualities of the physician-patient relationship require the C disclosure of medical data to a patient or agent upon request, and that the patient need not engage in legal proceedings to obtain that information.

(emphasis added)

D That principle establishing the patient's right of access to medical records based on the fiduciary relationship between the patient and the doctor is equally applicable in Malaysia. In fact the MMC's Code of Medical Ethics 2002 enjoins that physicians should make decisions which are always in the best interest of the patient. Thus, reiterating the fiducial nature of the patient-E physician relationship.

[21] Based on the legal duties and rights that arise from the physician-patient fiducial relationship, and further having regard to the provisions in the guideline and the common law principles, the legal position in Malaysia *vis-à-vis* the patient's right of access to medical records can be summarised as F follows:

(a) The ownership of a patient's medical record vests with the physician or hospital as the case may be. However, the physician or hospital must deal with the medical records in the best interest of the patient;

G (b) The patient has an innominate and qualified right of access to his medical records and there is a corresponding general duty on the part of the physician or hospital to disclose the patient's medical records to the patient, his agents, medical advisers or legal advisers;

(c) The physician or hospital may refuse to disclose partly or wholly the H medical records to the patient in certain limited circumstances, such as, but not limited to, situations when such disclosure would be detrimental or prejudicial to the patient's health in that the information is likely to cause serious harm to the physical or mental health of the patient or of any other individual contained in the medical records; or when such I disclosure would divulge information relating to or provided by an individual, other than the patient, who could be identified from that information;

(d) When the circumstances giving rise to such qualification for refusal to disclose does not present itself, and when the request for disclosure is reasonable, having regard to all the circumstances, the physician or hospital shall give copies of the medical records to the patient upon payment of reasonable copying charges.

[22] At times arguments have been forwarded by some private hospitals that they would disclose the patient's medical records only after the patient has obtained a court order. This argument is premised on reg. 44(2) of the Private Healthcare Facilities and Services (Private Hospital and Other Private Healthcare Facilities) Regulations 2006 that provides:

> No patient's medical record shall be taken out from the private healthcare facility or service except under a court order and when taken out from the private healthcare facility or service under a court order, a copy of the records shall be retained by the private healthcare facility or service and the original records shall be returned to the private healthcare facility or service at the end of the proceedings for which the records were directed to be procured.

A careful reading of reg. 44(2) shows that the intent of that regulation is to ensure that original copies of medical records are always secured safely within the premises of the private healthcare facility. In this regard, reg. 44(2) provides that the original medical records cannot be removed from the private healthcare facility unless with a court order and even in such circumstance a copy is to be kept at the said private healthcare facility and the original returned promptly. It is clear that reg. 44(2) does not primarily deal with the patient's right of access to medical records. It deals with the security of the original medical records. Regulation 44(2) does not stipulate that whenever a patient wishes to have access to his medical records, he must get a court order. Therefore the reliance of private healthcare operators on reg. 44(2) to withhold patient's access to medical records until the patient obtains a court order is entirely misconceived. There is no requirement in law that the patient first obtains a court order to get access to his medical records.

[23] Physicians and hospitals would be well advised to grant access to patient's medical records unless there were circumstances warranting the withholding of the same for reasons discussed earlier. If access is withheld unreasonably and the patient is to put to cost and expense to procure a court order to compel production of the medical records, for instance under the provisions of O. 24 r. 7A of the Rules of Court 2012, then the patient would in such circumstance be entitled to cost on a solicitor-client basis.

Trial And Assessment On Quantum Of Damages

[24] At the trial on quantum of damages the following witnesses gave evidence for Nurul:

(i) The mother, the second plaintiff Dr Nor Azalina binti Mohd Songib (PW1);

(ii) The father, Mr Muhammad Hafiz bin Abd Wasit (PW2);

(iii) Consultant rehabilitation physician, Associate Professor Dr Lydia Abdul Latif (PW3); and

(iv) Consultant physiotherapist, Dato' Dr Balwant Singh Bains (PW4).

[25] The defendants' sole witness was rehabilitation physician Dr Sharon Anne Khor Keat Sim (DW1).

[26] The evidence shows that the first plaintiff, Nurul Husna, suffers from severe cerebral palsy resulting in her being totally dependent on others for her care and needs. Both her parents (PW1 and PW2) had testified on the difficulties faced by them in caring for Nurul Husna to the extent that it had affected adversely their marital life and has put a heavy strain on their family life. It was very evident that caring for Nurul Husna was extremely time-consuming and stressful. Nurul Husna's physical and mental condition meant that she will not be employable. Her parents will therefore have to continue to provide for her throughout her life. Counsel for the plaintiffs concedes that Nurul Husna is not entitled to make a claim for loss of earnings.

[27] Nurul Husna's mother, the second plaintiff, is a medical doctor who qualified as a radiologist in 2012. She is employed by the Malaysian Government and is stationed at the Johor Bahru Hospital. The second plaintiff testified that she has plans to go into private practice, which is more lucrative and would give her more flexibility in scheduling her working hours in order to provide better care to Nurul Husna. Nurul's father who works in Kuala Lumpur as an information technology officer commutes to Johor Bahru on the weekends, where the second plaintiff resides with Nurul Husna and her other child. The second plaintiff further testified that the reason she had moved to Johor Bahru was to get support from her aged parents in taking care of Nurul Husna.

[28] In regard to Nurul Husna's past, present and future needs counsel for the plaintiffs has referred to the factual and expert evidence adduced in court and the relevant principles of law regarding compensation in cases of this nature. It is trite that in a negligence claim, the court can award damages only in monetary terms (see *Jag Singh v. Toong Fong Omnibus Co Ltd* [1964] 1 LNS 50; [1964] 30 MLJ 463). The court cannot make an award for any specific relief against the defendants in a tortious claim for damages, for example, to order the tortfeasor to undertake repairs, provide medical treatment, supply goods and services.

[29] I accept the plaintiffs' counsel's contention that a reduction in the quantum of damages based on the promise from the tortfeasor to provide free medical treatment to the victim of the tort is contrary to legal principle nor would the contractual obligations (arising from the second plaintiff's employment by the first defendant) be a ground to reduce damages. Nor should damages be reduced by virtue of any statutory duty of the government to provide medical care to the first plaintiff by virtue of her incapacity.

[30] In *Peters v. East Midlands Strategic Health Authority And Others* [2009] LS Law Med 229 defendants therein argued that since the local council had a statutory duty under subsisting legislation to provide care, damages ought to be reduced to reflect that duty. The English Court of Appeal in rejecting that argument held that:

> Having reviewed these authorities, we can now express our conclusion on this issue. *We can see no reason in policy or principle which requires us to hold that a claimant who wishes to opt for self-funding and damages in preference to reliance on the statutory obligations of a public authority should not be entitled to do so as a matter of right. The claimant has suffered loss which has been caused by the wrongdoing of the defendants. She is entitled to have that loss made good, so far as this is possible, by the provision of accommodation and care.*
>
> ... provided there was no risk of double recovery, there was no reason in policy or principle why the claimant should give up her right to damages rather than become dependent on the state.
>
> ...
>
> It was reasonable for the claimant to opt for self-funding in preference to reliance on the statutory obligation of the Council as the local authority. ... Nor was there any reason why the claimant should take the risk that further legislative changes might remove the disregard of damages for personal injury from those in receipt of public funding.
>
> (emphasis added)

[31] Likewise, here, the first plaintiff's entitlement to compensatory damages for the negligence of the defendants cannot be reduced or diminished even though the second plaintiff, and the first plaintiff as child and dependent of the second plaintiff, are entitled to free medical care by virtue of the second plaintiff's contract of employment with the government and/or by virtue of the first plaintiff's status as a disable person ('orang kurang upaya') who is afforded free medical care in the government hospitals under the existing policies of the current government. The contractual rights flowing from the second plaintiff's contract of employment is not permanent and if that contract were to be terminated by any party then the contractual right to free medical care is extinguished. In any event the second plaintiff cannot be curtailed of her right to leave her government employment in the future and be tied down. Likewise, government policies are not permanent in nature. The provision of free medical care in government healthcare facilities for disable persons may change in the future, as all government policies are susceptible to change from time to time.

[32] In Malaysia, the provision of healthcare by the government is not a matter regulated by statute. It is a matter of mere policy. A public officer who causes loss through his or her unlawful conduct has no right to receive a subsidy from the taxpayer. The victims of negligence caused by a public officer have no statutory right of assistance from the state. These victims would have to institute civil proceedings against the tortfeasors and seek

compensation in the form of damages. If the government is vicariously ordered to pay such damages then it may subject the wrongdoer to a surcharge action under the general orders. That is entirely between the government and the public officer.

[33] The general overriding principle governing the award of damages for injury arising from negligence was well stated by Raja Azlan Shah CJ (as His Royal Highness then was) in *Yang Salbiah & Anor v. Jamil Harun* [1981] 1 LNS 106; [1981] 1 MLJ 292 FC. Nurul Husna is entitled to special damages, pre-trial damages, general damages for pain and suffering and the loss of the amenities of life, and cost of future care.

Special Damages

[34] Special damages are awarded for the plaintiffs' actual pecuniary damage or loss suffered between the date of negligent act and the date when court delivers judgment. Special damages must be pleaded and particularised and must be proved by either oral or documentary evidence. See *ABDA Airfreight Sdn Bhd v. Sistem Penerbangan Malaysia Bhd* [2001] 8 CLJ 1; [2001] 3 MLJ 64.

[35] Special damages have been divided into two periods of claim. The first is from the date of negligence to the date of filing the writ and the second is the pre-trial losses.

(i) Special Damages For The First Period

[36] The special damages for the first period are from the date of incident on 22 July 2005 to the date of the statement of claim 27 December 2012, ie, a period of 89 months. The expenses claimed are as follows.

Medical Treatment And Hospital Admissions

[37] The amount claimed is RM2,500 and the counsel for the defendants has agreed to this sum. Therefore, I allowed the sum of RM2,500 for medical treatment and hospital admissions.

Special Food, Vitamins And Nutritional Supplements

[38] PW1 testified that Nurul Husna's food has to be specially prepared. She cannot eat the food that is prepared for the rest of her family members. This is evidence found in answers to Q 78 and 79 of the witness statement of Dr Nor Azalina Binti Mohd Songib (pp. 15, 49 and 51 of bundle B). In addition to the specially prepared food, Nurul Husna needs to been given vitamins and nutritional supplements such as Scott's Emulsion, Delima Plus and Habbatus Sauda to increase her resistance to diseases. (See answer to Q 88 of witness statement of Dr Nor Azalina Binti Mohd Songib). Nurul Husna's mother had testified that she spends the sum of about RM500 per month for Nurul Husna's special food, vitamins and nutritional supplements. See answer to Q 90 of witness statement of Nor Azalina Binti Mohd Songib.

As such, counsel for the plaintiffs submits that the sum of RM500 per month x 89 months = RM44,500 claimed under this head is reasonable in the circumstance.

[39] Counsel for the defendants whilst agreeing that Nurul Husna may need to be fed special food, vitamins and nutritional supplements, argues that without proper documentary evidence of payment receipts for such purchases, a sum of RM200 per month would be more appropriate.

[40] I allowed the sum of RM44,500 as claimed by the plaintiffs as the amount claimed is not farfetched in today's prices and it would be too much to expect Nurul Husna's parents to keep documentary proof of expenses incurred for these expenses since her birth. In this regard, I accept the submissions of counsel for the plaintiffs that the evidence was clear that the irreversible injuries and disabilities suffered by Nurul Husna had and continue to have an overwhelming and debilitating effect on her parents and carers. Their resources were centred on first saving her life and next caring for her. In such circumstances it is unreasonable to expect Nurul Husna's parents to collect bills and receipts and filing them away with a view to bringing a claim especially when the defendants had hidden their culpability in the treatment and management provided to Nurul Husna. (See *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82; [1988] 3 MLJ 332). Indeed, if the defendants had candidly acknowledged their negligence earlier, than Nurul Husna's parents could have taken legal advice much earlier and kept copies of their bills and receipts to support their claim. In this regard, I accept that it would be unrealistic to expect Nurul Husna's parents have copies of bills and receipts for all of the expenses.

Mechanical Aids And Appliances

[41] Nurul Husna's mother had testified that she had purchased certain mechanical aids and appliances for Nurul Husna. These equipment include the customised tilt-in-space wheelchair, feeding chair, standing frame, ankle foot orthosis, leg gaiter, toys for therapy, and therapy balls. See answer to Q 99 of witness statement of Dr Nor Azalina Binti Mohd Songib. The plaintiffs had pleaded the sum of RM5,000 for this head of damages and counsel for the plaintiffs submits that this sum should be awarded in full.

[42] Counsel for the defendants do not deny that this sum of RM5,000 is claimable as special damages. However, counsel contends that the second plaintiff can claim reimbursement of the cost of some of these mechanical aids and appliances under her terms of employment with the government. Though the defendants' witness, Dr Sharon Anne Khor (DW1), said that she had supported the approval the application for purchase of some of these mechanical aid, up to conclusion of the trial no evidence was adduced regarding the government's intention to refund the expenses incurred. In any event, if I were to allow this head of claim, the second plaintiff would be

precluded from making a double claim to the government under her employment perks. The government would have to pay this sum in any which way. Therefore, I allowed the sum of RM5,000 under this head of claim.

Diapers, Wipes And Creams

[43] Nurul Husna's mother had testified that Nurul Husna is both bowel and bladder incontinent and that Nurul Husna requires about 10-15 diapers a day in addition to wipes and creams. PW1 said that she spends the sum of RM500 per month on such expenses. (See answers to Q 93, 96, 97 and 98 of witness statement of Dr Nor Azalina Binti Mohd Songib). This claim is supported by some bills and receipts, though not complete. The total claim under this head would be RM500 per month x 89 months = RM 44,500.

[44] Counsel for the defendants submits that any child, whether normal or disabled such as Nurul Husna would need diapers, wipes and creams only up till three years old. I cannot accept that contention. It is evident from evidence adduced that Nurul Husna who is now eight years old is still both bowel and urine incontinent and thus she would require diapers and wipes and cream. This is a necessary expense and would have been incurred. Counsel for the defendants further states that since there is no complete evidence in support of this claim, a sum of RM300 per month would be more appropriate. Having considered the evidence, I was of the opinion that the sum claimed by the first plaintiff was reasonable in the circumstance. For reasons stated earlier, the fact that the plaintiffs could not give a complete set of bills and receipts for this item cannot be a reason to lower the claim. The court would have to assess what would have been the reasonable needs of the first plaintiff. In this regard I find that the claim for RM44,500 is reasonable and so I awarded the same.

Medicines, Syringes And Gauze

[45] Nurul Husna's parents had incurred expenses in purchasing gauze, plasters, creams, gastrostomy feeding tubes and syringes. The pleaded sum under this head of damages is RM300 per month and the total works out to be RM300 per month x 89 months = RM26,700. Counsel for the plaintiffs submits that this sum is reasonable. However, counsel for the defendants whilst conceding that such expenses would have been incurred, submits that the amount of RM100 per month is more reasonable. However, defendants' counsel has not proffered any cogent reason as to why the sum claimed should be reduced to RM100 a month. As such, I allowed the claim of RM26,700 under this head.

Traditional Massage Therapy

[46] Nurul Husna's parents gave unchallenged evidence of taking her for traditional massage therapy. Associate Professor Dr Lydia (PW3) had mentioned in her expert report that complementary and alternative medical therapy brings benefit to persons suffering from cerebral palsy. PW1 stated

that these therapies cost RM60 per month. The total claimed under this head is RM60 x 89 months = RM5,340. Counsel for the defendants submits that there ought to be a 1/3 deduction for this head of claim. However, no reason is given as to why there should be this 1/3 deduction. In the premise, I find that the claim of RM5,340 under this head is reasonable and I allowed the same.

Travelling Expenses

[47] There is uncontroverted evidence that following her birth Nurul Husna first lived in the Klang Valley with her parents. Following transfer of her mother to Johor Bahru Hospital in January 2012, Nurul Husna lives with her mother in her grandparents' home in Johor whilst her father stays in Kuala Lumpur and commutes to Johor the weekends. From time to time her parents had to travel long distances so that the family could be together.

[48] It is not denied that Nurul Husna had to travel to hospitals, private therapy centres, Pusat Dalam Komuniti (PDK) Centres, the Johor Spastic Centre and traditional massage therapy centres for her treatment and rehabilitation. Her parents had to travel to various places to purchase various items for Nurul Husna for example to purchase medicines, appliances and equipment, diapers, wipes and creams. Her parents had to travel to employment agencies for the purposes of employing maids. Nurul Husna's mother had prepared a table regarding the travel undertaken which was marked as exh. "P5".

[49] Counsel for the plaintiffs submits that taking into consideration the amount of travelling undertaken it would be reasonable to estimate the cost of travelling to be in the sum of RM500 per month, which over a period of 89 months would work out to a total of RM44,500.

[50] Counsel for the defendants submits that there ought to be a 1/3 deduction as these travel expenses would not be solely incurred for Nurul Husna or her needs. Having considered the evidence in particular the chart prepared by PW1 and marked as exh. "P5", I was of the view that these travel expenses were for Nurul Husna and therefore I allowed the total claim of RM44,500 in full.

Cost Of Care By Maid

[51] Nurul Husna's family had always employed a foreign maid to care for her since shortly after her birth, beginning December 2005. About five different maids had looked after her for different periods up to trial. These foreign maids are not trained and do not look forward to taking care of cerebral palsy children, like Nurul Husna. Often enough foreign maids abscond for various reasons, including the stress of work. Nurul Husna's mother had testified on the difficulties faced in caring for Nurul Husna and that both she and the maid are extremely tired at night. (See answer to Q 34 of witness statement of Nor Azalina Binti Mohd Songib.) Further, Nurul Husna's parents have to pay the maid agency fees, government levies and

foreign agency recruitment fee in addition to the salary of the foreign maid. Nurul Husna's parents will also have to bear the cost of providing food, accommodation, travel expenses, and medical care to the maid.

[52] Counsel for plaintiffs submits that it would therefore be reasonable to estimate the cost of employing a maid to be in the sum of RM1,350 per month. Therefore from December 2005 till filing of the writ that would work out to RM1,350 per month x 85 months = RM114,750.

[53] Counsel for the defendants on the other hand estimates that the monthly cost of employing a maid would be about RM1,000 a month. Counsel further submits that the maid would not be solely looking after Nurul Husna and that she would have also been required to do other household duties. As such counsel argues that there ought to be a deduction of 1/4 from the total amount. Thus, counsel for the defendants proposes the sum under this head be RM1,000 x 108 months x 1/4 = RM27,000. Having considered both arguments, and based on the documentary evidence at pp. 47, 49, 51 and 55 of bundle B and the oral evidence of PW1 and PW2, I am satisfied that the monthly cost of employing a maid is more in the region of RM1,350 as submitted and I am also convinced that the maid was used solely for the benefit of Nurul Husna. In fact the reason why PW1 shifted to Johor Bahru and live in her parents low cost home was so that she could get extended family support in taking care of Nurul Husna. Therefore, it is clear that the support of this maid alone was not sufficient to take care of Nurul Husna. Therefore, I find that the suggestion that the maid must have necessarily done work for other members of the family that warrants this 1/4 deduction is without merit. In the circumstance I allowed the sum of RM114,750 claimed under this head.

Cost Of Care By Family Members

[54] The principle that gratuitous care of disable persons by family members can be quantified on a commercial basis and compensated in damages was reiterated by VC George JCA in *Tan Cheong Poh & Anor v. Teoh Ah Keow* [1996] 3 CLJ 665 at p. 682; [1995] 3 MLJ 89 p. 102 where he had said as follows:

> No doubt the plaintiff's mother has been providing her services free of charge to her handicapped daughter but the courts have always compensated plaintiffs for the true value of the services that the plaintiff needs even though it is provided by a parent or other relative.

[55] Nurul Husna's mother had testified in detail as to the nature and extent regarding the care that she provides to Nurul Husna. The following evidence of Nurul Husna's mother in her witness statement (PWS1) is very telling and relevant:

> Q28: Has Nurul Husna's condition affected your career? If yes, how?
>
> - Yes

- Less sleep at night causing sleepiness and tiredness, affects performance at work.
- Have to use time off from work two to four times in a month for three hours each time to bring Husna to therapy and appointment. Has to come back and work during lunch or weekends to settle my works.
- Also have to use my rest leave for Husna's hospital appointment or if Husna or her carer is sick. No daycare willing to take care of Husna if the carer is sick. My parents cannot carry Husna as they are not quite well and Husna is quite heavy.
- My mother is totally blind complicated by brain tumour and my father has underlying medical problem.

Q31: Does your husband help you in taking care of Nurul Husna?

Yes. When I was staying in KL, my husband and I take turn to take leave or time off from work to bring Husna for hospital appointment or therapy.

Now that we are separated, Husna is totally handled by me in JB. My husband comes back one to two times per months, on weekend, spend time with us and gives us support and he will never miss to bring Husna for outdoor activity.

Q34: Are you satisfied with the current arrangement?

- No
- For now, we only have one carer, she does get tired taking care of Husna all day alone. And night time, we both tired as Husna cannot sleep well.
- I need to use my leave and working time for Husna's therapy as no weekend therapy provided by government.
- I have to handle Husna alone in JB as to follow my employer's order despite having special needs kid.

Q40: How many times have you taken leave or time off for Nurul Husna's purposes?

- For 2013:
  - Leave for Husna's purposes: 17 days
  - Time-off for Husna's purposes: 12 days

*time off taken if there's some one can cover me once I'm away. Otherwise I have to take leave.

- Unpaid/Half pay leave:

2005 - 3 months. Husna just born. No carer willing to take care.

2009 - 4 months. Husna underwent surgery for dislocated hip.

[56] There is evidence that besides Nurul Husna's parents, other family members such as Nurul Husna's maternal grandparents also provide care to Nurul Husna. Despite the fact that Nurul Husna has a full time maid to take care of her, the experts agree that the parents would remain Nurul Husna's principal carers. This puts added strain on them.

[57] Counsel for the plaintiffs submits that the estimated value of the cost of care provided by family members is RM1,000 per month, which over a period of 89 months works out to RM89,000.

[58] Counsel for the defendants argue that there should not be any award of damages under this head because there is no evidence that Nurul Husna' grandparents had actively taken care of her.

[59] In considering both these argument, I am minded to observe that this head of claim is not confined to the care given by Nurul Husna' grandparents, who admittedly are aged and ill with disabilities of their own. This head of claim also relates to the care given by Nurul Husna's parents particularly her mother who has to sacrifice her time and take leave from work to attend to the needs of Nurul Husna. In this regard, I was of the opinion that the sum of RM500 a month is reasonable. Thus, I allowed the sum of RM44,500 under this head of claim as being reasonable under the circumstance.

Cost Of Airfare Of Maids

[60] There is evidence that Nurul Husna's parents had incurred the sum of RM741.90 on airfare for the foreign maids (see pp. 71, 78 and 79 of bundle B). Counsel for the plaintiffs submits that this sum of RM741.90 should be allowed in full. Whilst, counsel for the defendants argues that there ought to be a 1/4 deduction on grounds that the maids would not have solely attended to the needs of Nurul Husna. For reasons discussed earlier, I did not accept this argument and thus allowed the full sum of RM741.90 claimed under this head.

Additional Cost Of Holidays

[61] Nurul Husna's parents had testified as regards the additional expenses incurred in taking Nurul Husna for holidays. This would include additional work in preparing Nurul Husna's dietary requirements, in taking along Nurul Husna's equipment and appliances, and in getting additional hotel room for Nurul Husna's carers. (See answer to Q 128 of witness statement of Dr Nor Azalina Binti Mohd Songib). The following evidence of Nurul Husna's mother in her witness statement (PWS1) is relevant:

> Q68: What preparations need to be made for Nurul Husna's travelling needs?
>
> - Proper arrangement, chosen place must be disabled friendly.
> - If requires flight, need to get disabled friendly facility with extra cost.
> - Extra room for carers.

Q69: What items do you bring along when travelling with Nurul Husna?

- Blended diets.
- A lot of clothes, handkerchief, wipes, creams, diapers.
- Numerous medicines.
- Porridge, milk, nestum.
- Feeding tube and feeding equipments.
- Blender to blend porridge.
- In space tilt wheelchair.
- Feeding chair.

If requires night stay, we also needs to bring:

- cooker, rice and sometimes raw food to cook.
- syringes for feeding and medicines."

[62] Counsel for the plaintiffs argues that this is a well-recognised item of damages and submits that the pleaded sum of RM3,000 per year as the additional cost of holidays would be a reasonable. Thus, counsel submits that the total sum under this head would be RM3,000 per year x 7 years = RM21,000. Counsel for the defendants' whilst conceding in principle, submits that the amount of RM150 a year be allowed. I was of the view that the amount of RM150 was far too low and I allowed the sum of RM1,000 per year for a total of RM7,000, as being more reasonable.

Cost Of Air Conditioning, Special Clothes And Bed

[63] Nurul Husna's parents had to buy special clothes, including bibs and napkins, and a bed and mattress for her. They had to fit an air-conditioner in her room. Some of the bills and receipts for such claims are at pp. 46 to 56, and 62 of bundle B. Counsel for the plaintiffs submits that the pleaded lump sum of RM5,000 would be reasonable for such expenses to be incurred over a period of 89 months. Counsel for the defendants on the other and argues that no such award be allowed for lack of supporting evidence. I found that there was some evidence in support of this claim, particularly at pp. 46 to 56, and 62 of bundle B. Therefore, I allowed the sum of RM5,000 as claimed under this head.

[64] When these items of claim for special damages in the first period are totalled it works out to a total sum of RM345,031.90.

(ii) Special Damages For The Second Period (Pre-trial)

[65] The pre-trial period would cover the period from the date of the statement of claim ie, 27 December 2012, to the date of judgment on assessment of damages on 27 April 2014, that is a period of 15 months. It

was evident that in giving continued care to Nurul Husna her parents had continued to incur expenses during the pre-trial period. Most of the heads of claim are similar to that of the first period of claim and they include:

Medical Treatment And Hospital Admissions

[66] There was evidence adduced that during the pre-trial period, Nurul Husna continued to go to clinics and hospitals for treatment. Counsel for the plaintiffs submits that a lump sum of RM3,000 would be appropriate for in-patient admissions to hospitals and out-patient visits to general practitioner clinics. This would be for a period of 15 months. Counsel for the defendants argued that this sum ought not to be allowed. Having considered both arguments, I was of the view that there indeed instances of Nurul Husna's parents incurring medical cost for in-patient and out-patient treatment and the lump sum of RM5,000 claimed would be reasonable in the circumstance. Thus, I allowed this claim for RM5,000.

Special Food, Vitamins And Nutritional Supplements

[67] Based on the same earlier reasoning, where I awarded the sum of RM500 a month under this head during the first period. I similarly awarded the sum of RM500 per month for 15 months for a total sum of RM7,500.

Diapers, Wipes And Creams

[68] Based on the same reasoning that I had adopted for the first period of assessment, I awarded the sum of RM500 per month for diapers, wipes and creams over 15 months for a total of RM7,500.

Medicines, Syringes And Gauze

[69] Based on the same reasoning that I had adopted for the first period of assessment, I awarded the sum of RM300 per month for 15 months for a total of RM4,500.

Traditional Massage Therapy

[70] Based on the same reasoning that I had adopted for the first period of assessment, I awarded the sum of RM60 per month for 15 months for a total of RM900.

Travelling Expenses

[71] Based on the same reasoning that I had adopted for the first period of assessment, I awarded the sum of RM500 per month for 15 months for a total of RM7,500.

Cost Of Care By Maid

[72] Based on the same reasoning that I had adopted for the first period of assessment, I awarded the sum of RM1350 per month for 15 months for a total of RM20,250.

Cost Of Care By Family Members

[73] Based on the same reasoning that I had adopted for the first period of assessment, I awarded the sum of RM500 per month for 15 months for a total of RM7,500.

Additional Cost Of Holidays

[74] Based on the same reasoning that I had adopted for the first period of assessment, I awarded the sum of RM1,000.

Cost Of Purchase Of A Toyota Estima Motor Vehicle

[75] Nurul Husna's parents had given evidence that they had purchased a second hand Toyota Estima for the purpose of Nurul Husna's travelling needs, including for her therapy sessions and follow-up consultations, and to PDK and Johor Spastic Centre. The car that they had then was insufficient to cater to the needs of Nurul Husna's travels. Nurul Husna's mother testified that she had purchased the Toyota Estima so as to accommodate Nurul Husna's wheelchair and to have enough room for Nurul Husna's maid to accompany her. Counsel for the plaintiffs acknowledge that Nurul Husna's mother also has use of the car, which according to counsel is incidental. However, in this regards, counsel proposed that a one-half deduction be made from the purchase price of the Toyota Estima to take into account the use by Nurul Husna's mother. Thus, the plaintiffs' claim under this head was RM180,000 x 1/2 = RM90,000. This I found it to be reasonable and I allowed the sum of RM90,000.

[76] Counsel for the plaintiffs also submitted that following Nurul Husna's mother's transfer to Johor Bahru in January 2012, the travelling expenses for Nurul Husna have increased. The following travelling was undertaken for Nurul Husna's needs:

		Distance (two-way)
40.1.	Follow-up consultation at Hospital Sultanah Aminah	50 km
40.2.	Rehabilitation consultation at Hospital Sultan Ismail	20 km
40.3.	Traditional massage in Johor Bahru	50 km
40.4.	Rehabilitation at Johor Bahru Spastic Centre	50 km
40.5.	Private physiotherapy at GreatlifePhysio	100 km

[77] Counsel submitted that Nurul Husna should be awarded the further sum of RM800 per month as the cost of petrol, insurance, road tax, toll and parking charges, and wear and tear and repairs of the car. I did not allow this claim as I had already awarded the sum of RM500 as cost of transport and travel.

Cost Of Private Physiotherapy

[78] The evidence shows that beginning March 2013 Nurul Husna has been attending physiotherapy, occupational therapy and speech therapy at Johor Bahru Spastic Centre at the cost of RM40 per month and that over a period of 12 months works out to RM480. Nurul Husna's mother had also testified that she was taking Nurul Husna to a private therapy centre called Greatlife Physio every weekend at the cost of RM300 per month beginning November 2013 which over a period of four months totals RM1,200. These additional therapy sessions were warranted and were beneficial to Nurul Husna. Thus, I allowed both these claims for the total sum of RM1,680.

[79] When all these items of claim for pre-trial damages are added up they total to RM151,330.

(iii) General Damages – Pain And Suffering Pain And The Loss Of Amenities Of Life

[80] The medical reports found in the bundles set out the following regarding Nurul Husna's health:

(i) Severe metabolic acidosis at birth;

(ii) Intractable seizures at 15 hours of life;

(iii) Lumbar puncture done on day three of life;

(iv) Admitted to NICU for 26 days;

(v) Feeding by Ryles tube;

(vi) Infantile epilepsy requiring anti convulsant medication;

(vii) Cortical visual impairment;

(viii) Gastrostomy operation done for insertion of feeding tube into the stomach at nine months of life;

(ix) Revised operation with button gastrostomy at three years of life;

(x) Severe gastroesophageal reflux problem requiring anti-reflux medication;

(xi) Frequent constipation due to gastrostomy feeding requiring ravin enema for voiding of bowel;

(xii) Recurrent myoclonic seizures;

(xiii) Irreversible spastic quadriplegic, cerebral palsy and global developmental delay; and

(xiv) Hip dislocation and its subsequent replacement surgery.

[81] Nurul Husna is alive to her surroundings but her body and mind are trapped as a result of the severe and irreversible brain damage. She is totally dependent on others for her everyday needs.

[82] In *Gleneagles Hospital (KL) Sdn Bhd v. Chung Chu Yin & Ors And Another Appeal* [2013] 8 CLJ 449 the sum of RM350,000 was awarded for such head of damages. In the draft Revised Compendium of Personal Injuries Awards prepared by the Bar Council the sum of RM385,000 has been proposed for such award. In this regard, counsel for the plaintiffs propose that the sum of RM400,000 would be a reasonable and realistic sum to award for such damage. Counsel for the defendants submit that the sum of RM350,000 awarded in *Gleneagles Hospital (KL) Sdn Bhd v. Chung Chu Yin & Ors And Another Appeal* would be the proper benchmark. Having considered the factual circumstance and the law, I agreed with submissions of counsel for the defendants and had decided to follow the precedent in *Gleneagles Hospital (KL) Sdn Bhd v. Chung Chu Yin & Ors And Another Appeal*. Thus, I awarded the sum of RM350,000 as general damages for pain and suffering and loss of amenities of life.

(iv) General Damages – Cost of Future Care

[83] I will now move on to the issue of the future needs of Nurul Husna. The award of future damages or cost of future care in Malaysia is done on a once-and-for-all assessment basis, unlike in England where damages may be assessed periodically, following judgment on liability. Thus, in Malaysia the victim cannot return to court in the future to claim more damages because his or her injuries have worsened, or if unexpectedly the victim has more needs and the original award had proved inadequate.

[84] In *Lim Poh Choo v. Camden and Islington Area Health Authority* [1979] 2 All ER 910 at p. 914 Lord Scarman when commenting on the practice of assessing damages on a once-and-for-all basis made a very telling observation in the following words:

> There is really only one certainty: the future will prove the award to be either too high or too low.

[85] Thus, in making this once and for all assessment, courts are invariably guided by the opinions of experts and in this regard the court must see that the expert opinion is reasonable, responsible and respectable; and that it stands up to a logical analysis. (See *Bolitho v. City Hackney Health Authority* [1997] 4 All ER 771). The future exigencies of the plaintiff's needs are best determined by educated and well informed surmises and postulations by experts in that field. The courts have had regard to well established principles in trying to make a reasoned and well informed award of future damages. The standard of proof regarding future damages is not the balance of probabilities but the possibility or danger of some adverse future developments. See *Hawkins v. New Mendip Engineering Ltd* [1966] 3 All ER 228, CA; and *Schrump Et Al v. Koot Et Al Lexsee* [1977] 18 OR (2d) 337, where the Canadian Court of Appeal said as follows:

> ... In assessing damages for personal injuries the award may cover not only all injuries actually suffered and disabilities proved as of the date of trial, but also the "risk" of "likehood" of future developments attributable to such injuries. It is not the law that a plaintiff must prove on a balance of probabilities the probability of future damage: he may be compensated if he proves in accordance with the degree of proof required in civil matters that there is a possibility or a danger of some adverse future development.

[86] Now, having settled the general principles of assessment of future damages, I will move on to the assessment proper. In determining the cost of Nurul Husna's future needs, the court must take into account that there are likely to be various changes in Nurul Husna's life, including in regard to her carers and surroundings. It is a given that Nurul Husna's parents are likely to move from one place of residence to another as and when there are changes in their careers or when the circumstance demands it. Whatever changes to their lifestyles would be subject to Nurul Husna's condition and special needs.

[87] To assist the court in making this onerous determination, the plaintiffs have called two independent experts. They are Associate Professor Dr Lydia Abdul Latif (PW3), a consultant rehabilitation physician from the University of Malaya and Dato' Dr Balwant Singh Bains (PW4) private consultant physiotherapist. The defendants on the other hand called Dr Sharon Anne Khor Keat Sim (DW1) a consultant rehabilitation physician from the Johor Bahru Hospital as their expert witness.

Determination Of The Multiplier

[88] The multiplier is a crucial component in determining the amount of damages to be awarded as future cost of care. The multiplier is derived by having regard to the life expectancy of Nurul Husna. Associate Professor Dr Lydia Abdul Latif (PW3) had estimated Nurul Husna's life expectancy to be between 30 to 40 years but in cross-examination said that she was willing to accept as a compromise a life expectancy of 35 years. PW3 had in the course of her evidence stated that she has seen one patient of similar disability to that of Nurul Husna living to the age of 59. I accept that with better access to medical care and improvements in the care of patients such as Nurul Husna it is more probable than not that the life expectancy of such persons would be far more than what it used to be.

[89] Counsel for the plaintiffs submits the court should give to Nurul Husna's the benefit of any doubt regarding her life expectancy. Counsel had based that submissions on the fact that in Malaysia where damages are assessed on a once-and-for-all basis Nurul Husna cannot return later to seek more damages if time proves the award to be too low by reason of her longer than expected life expectancy. Therefore, counsel argues that applying the principles in *Lim Poh Choo* and *Schrump et al*, the court should take the higher estimated life expectancy in deciding on the multiplier. Counsel further

submits that since only time will tell if too much or too little is given it would be prudent to accept a life expectancy of 40 years, which would give a multiplier of 22 years calculated as follows:

40 (life expectancy) – 8 (current age) – 1/3 for contingencies = 21.333 years

~22 years

[90] Counsel for the defendants on the other hand suggests that a life expectancy of 30 years be taken as their expert had stated in her witness statement that Nurul Husna has a 25% probability of surviving to age 30 and her prognosis was guarded because in her observation:

> ... the first plaintiff did not achieve basic developmental milestones of lifting her in prone, in addition to having risk factors associated with poor survival such as seizures, need for feeding tube, dysphagia, visual impairment, cognitive impairment, gastrointestinal complications such as gastroesophageal reflux disease, bowel incontinence, balder incontinence and scoliosis.

Therefore, counsel for the defendants submits that the multiplier ought be 15 by taking into account a life expectancy of 30 years, calculated as follows:

30 (life expectancy) – 8 (current age) – 1/3 for contingencies = 14.66 years

~15 years

[91] Both counsel are agreed on the 1/3 deduction for contingencies as settled by the Court of Appeal in *Takong Tabari v. Government of Sarawak & Ors & Another Appeal* [1998] 4 CLJ 589; [1998] 4 MLJ 512 CA. I agree with submissions of counsel for the plaintiffs that since a one-third deduction has been made for contingencies in deriving the multiplier, no further deduction should be made when assessing the damages to be awarded to Nurul Husna.

[92] Having considered the arguments and the evidence and opinion of the experts, I find that the median between 30 years and 40 years, ie, 35 years would be a good postulation to make in respect of Nurul Husna's life expectancy. That would be fair and reasonable. In fact PW3 Dr Lydia had agreed that though she thought that Nurul Husna can live for up to 40 years, she would be prepared to settle for 35 years. Thus the calculation of the multiplier would be as follows:

35 (life expectancy) – 8 (current age) – 1/3 for contingencies = 18 years

(v) General Damages – Cost Of Future Care

[93] The awards for future general damages sought are categorised under the following heads:

(a) Cost of two carers – maids;

(b) Cost of care provided by family members;

(c) Cost of travelling on a modified disabled friendly vehicle;

(d) Cost of a disabled friendly home;

(e) Cost of diapers, wipes and creams;

(f) Cost of nutrition, food and supplements;

(g) Cost of machines, appliances and equipment;

(h) Cost of medication, syringes and gauze;

(i) Cost of physiotherapy;

(j) Cost of occupational therapy;

(k) Cost of speech therapy;

(l) Cost of botox injections;

(m) Cost of medical treatment and hospital admissions;

(n) Additional cost of holidays and respite care;

(o) Cost of education of carers;

(p) Cost of future surgery;

(q) Damages for future pain and suffering from such surgery;

(r) Cost of education to train for living skills; and

(t) Cost of future accommodation and living expenses for Nurul in adulthood.

Cost Of Two Carers

[94] Nurul Husna's mother during her testimony explained the difficulties faced by one maid in attending to Nurul Husna's special needs and expressed her need for two maids. The following evidence of Nurul Husna's mother in her witness statement (PWS1) is relevant:

Q34: Are you satisfied with the current arrangement?

- No
- For now, we only have one carer, she does tired taking care of Husna all day alone. And night time, we both tired as Husna cannot sleep well.
- I need to use my leave and working time for Husna's therapy as no weekend therapy provided by government.
- I have to handle Husna alone in JB as to follow my employer's order despite having special needs kid.

Q37: Is one carer enough?

No.

Q38: Please explain.

Husna must have two carers at one time because

- She requires full attention due to spasm and reflux that she has. At night, she cannot sleep well. One carer to handle the 24 hours job is tiring. This is admitted by few of Husna's previous carers. With two carers, they can take turn alternate day which will reduce their stress.
- Husna will need one person attended to her specifically for therapy every day. 1 carer tend to do other things rather than concentrate on Husna although we told them not to. Sitting and doing same thing for 24 hours and 360 days per year is so stressful and boring.
- More than one person required to accompany Husna in the car while I'm driving.
- Two person required to lift up the tilt in space wheelchair into the car and to bring it out of the car while another person need to taking care of Husna in the car.

[95] From the evidence adduced it was clear that taking care of Nurul Husna is exhausting, stressful and depressing. Her carers are likely to suffer from carer fatigue. Nurul Husna's mother had testified that her career has been adversely affected as a result of caring for Nurul Husna. Nurul Husna's mother had also complained of feeling sleepy and tired at work whenever she had to stay up late at night to attend to Nurul Husna. (See: answer to Q 28 of witness statement of Dr Nor Azalina Binti Mohd Songib).

[96] Counsel for the plaintiffs further submits that it is also not denied that the maids employed to take care of Nurul Husna will have to be trained and retrained. The evidence adduced does indicate that it would be difficult to get a single maid who is willing to undertake the task of caring for a severely brain-damaged child. I accept the contention that Nurul Husna and her parents should not be left stranded if a single maid resigns, absconds or falls ill. Nurul Husna's parents should be freed of this burden so as to allow them to concentrate on their respective careers and on their other child.

[97] There is legal precedent for the award of two maids when the circumstance requires or permits it. In *Raja Zam Zam v. Vaithiyanathan* [1965] 1 LNS 145; [1965] 2 MLJ 252 Azlan Shah J (as His Royal Highness then was) awarded the claimant the cost of engaging two maids following injuries suffered by the claimant.

[98] Counsel for the plaintiffs concedes that the second maid is also likely to undertake incidental work not related to Nurul Husna. Therefore, counsel suggests that Nurul Husna should be awarded the full cost of one maid and one-third cost of the second maid. Counsel submits that if this formula is allowed then the cost of the first maidwould be RM1,350 per month x 264 months (multiplier of 22 years) = RM356,400 and the cost of the second maid would be one-third cost of the first maid which would amount to RM356,400 x 1/3 = RM118,800.

[99] Counsel for the defendants submits that in this case one carer is good enough if that maid is confined solely for Nurul Husna's needs. Counsel suggests that the maid can be relieved to take rest by Nurul Husna's parents. Therefore, counsel submits that the cost of one carer should be RM800 a month x 180 months (multiplier of 15 years) = RM144,000.

[100] Since I have already found that the reasonable cost of a maid is RM1,350, I would have to disagree with the submissions of counsel for the defendants that RM800 would be the cost of a maid. Further, in deciding the rate to be used, no allowance is made for any increase in wages for the future. I would have to agree with submissions of counsel for the plaintiffs that a fair and reasonable monthly cost of a maid is RM1,350. Further, I have also fixed the multiplier at 18 years of purchase. The only remaining issue is whether Nurul Husna's needs and the needs of her parents in taking care of her would be best served by one or two maids. In considering this issue, I am minded of the fact that Nurul Husna's parents find it extremely difficult to take care of Nurul Husna. The difficulties, trials and tribulations presented by Nurul Husna as she grows older would increase and would pose a great challenge to her carers and parents. At the same time, Nurul Husna's parents should also be allowed to live as a normal a life as they can and to prosper in their career. They should be allowed time for themselves and to get some respite from the trials and tribulations that they encounter in the care of Nurul Husna. The parents should also be given the opportunity to devote time and care to their other child. Therefore, when all these factors are considered, I found that it would be best that two maids take care of Nurul Husna on a roster basis so that it does not become too strenuous for the maids. This would also eliminate short turnover of maids or the incidence of them absconding. Quick turn over of the maids would mean the training and retraining of new maids which would pose an added strain on Nurul Husna as well as her parents. I also accept the concession by counsel of the plaintiffs that only 1/3 of the cost of the second maid be allowed as the second maid would also be doing other household chores when not taking care of Nurul Husna. In this regard, my calculation of the cost of these two maids would be:

(a) Cost of the first maid:

RM1,350 per month x 216 months = RM291,600; and

(b) Cost of the second maid:

RM291,600 x 1/3 = RM97,200.

The total cost of these two maids would thus be RM291,600 + RM97,200 = RM388,800.

Cost Of Disabled-Friendly Motor Vehicle

[101] Nurul Husna's mother had given unchallenged evidence that the Toyota Estima she had purchased and used for Nurul Husna's travel is not suitable to be fitted with a chairlift and ramp recommended by the experts so as to be able to push the wheelchair into the car with Nurul Husna sitting in it. All the expert witnesses were of the view that Nurul Husna will require a multi-purpose vehicle that has been modified to accommodate Nurul Husna in her wheelchair and for her carers to be seated as well.

[102] Associate Professor Dr Lydia (PW3) had given the cost of such vehicle at RM140,000 inclusive of modifications. Dato' Dr Bains (PW4) had estimated the cost of such vehicle to be between RM130,000 and RM180,000 and valued the cost of modifications at RM30,000 with its yearly maintenance cost of RM500. Dr Sharon Anne Khor (DW1) the defendants' expert suggests that a Toyota Hiace can be used with the appropriate modification. The estimate of her cost for such a vehicle is also in the region of RM140,000.

[103] The plaintiffs counsel submits that the cost of such a vehicle be fixed at RM150,000 with three renewals totalling RM450,000.

[104] From the arguments, I found cogent reasons for me to allow the cost of this specialised vehicle at the price of RM150,000 with three renewals. However, in doing so I made a 1/3 deduction as the renewals would result in the previous vehicle having a trade-in residual value. Therefore, I allowed the sum of RM300,000 under this head.

Cost Of Care Provided By Family Members

[105] Nurul Husna's mother will remain her principal carer irrespective of the employment of two maids. There would be continued care provided by other members of the family. I have decided earlier to allow the sum of RM500 as the cost of care provided by family members. Therefore, over the 18 years multiplier that would amount to RM500 per month x 216 months = RM108,000. I allowed this sum of RM108,000 under this head.

Cost Of Renovations For Disable-friendly Home

[106] The defendants do not dispute the fact that Nurul Husna would need a disabled-friendly home. The defendants' counsel submits that the sum of RM50,000 would suffice to adequately modify and renovate Nurul Husna' parents' home to make it disable-friendly.

[107] Counsel for the plaintiffs, on the other hand, submits that Nurul Husna's parents will have to purchase a house at their own cost and expense and then renovate it to make it disable-friendly. Dato' Dr Bains (PW4) had given an estimate of RM150,000 to RM200,000 for the cost of such renovations. Counsel for the plaintiffs submits that the sum of RM200,000 would be reasonable.

[108] Evidence was adduced by PW1 and PW2 that they owned an apartment in Kuala Lumpur. This high rise apartment is serviced by elevators and has adequate space for Nurul Husna and her immediate family to reside. I find that this apartment can be renovated at a cost of RM100,000 to make it wheelchair and disable friendly for Nurul Husna's everyday needs. Therefore, I allowed the sum of RM100,000 under this head.

Diapers, Wipes And Creams

[109] The need for Nurul Husna to use diapers, wipes and creams her entire life cannot be denied. As she grows older I recognise that she will need adult diapers, which are more expensive. Both counsel propose the monthly sum of RM500 under this cost item. As I had earlier allowed the sum of RM500 per month for this head of damages, I allowed the sum of RM108,000 under this head, being RM500 per month x 216 months, ie, over a period of 18 years of purchase.

Special Food, Vitamins And Nutritional Supplements

[110] Counsel for the defendants concedes that Nurul Husna will always need specially prepared food, vitamins and other supplements. Defendants' counsel has proposed a monthly sum of RM500 and the plaintiffs' counsel has also proposed the sum of RM500 per month. Their total sum differs because of the different multiplier. I have accepted the sum of RM500 per month as being reasonable and awarded it for 18 years. Therefore the total amount under this head would be RM500 x 216 months = RM108,000.

Machines, Appliances And Equipment

[111] Counsel for the plaintiffs submits that the experts had proposed a range of equipment for Nurul's needs. These equipment will have to be serviced, repaired and where necessary replaced. The requirement for such machines, appliances and equipment will vary from time to time. Given below is the table of the proposals made by each expert:

Associate Professor Dr Lydia

Category	Items	Estimated Cost (RM)	Product Life span (years)	Number of Renewals
Positioning seating system	Positioning devices	5,000	10	3
	Seating system	5,000	5	5
Wheelchair and accessories	Tilt in space	6,000	5	5
	Wheelchair inserts	1,000	2	11
Orthotic	Bilateral ankle foot arthosis	800	2	11

Activities of daily living aids	Shower/commode chair	400	5	5
	Hoist	5,000	10	3
Therapy aids	Exercise ball	500	2	11
	Exercise mats	500	5	5
	Swings	1,000	5	5
	Toys and tools	500	-	-
Total (inclusive of renewals)		120,300		

Dato' Dr Bains

Category	Items	Estimated Cost (RM)	Product Life span (years)	Number of Renewals
Home therapy and positioning	Reclining wheelchair	4,000	4	6
	Commode seat	4,500	5	5
	Bolster & Foam Wedges	2,500	5	5
	Therapy ball	2,500	5	5
	Floor seat	4,500	5	5
Snoezelen therapy and special therapy area for home therapy	Maintenance: RM2,000 per year	80,000	Once in Life Time	-
Mobile Hoist (when Nurul turns 25 kg)	Hoist	15,000	7	4
	Cradle cloth	450	2	11
Standers	Standers	7,500	Once in Life Time	-
	Valcro straps	350	3	8
Tilt Table	Table	15,000	Once in Life Time	-
	Velcro	500	3	8
Walker		9,000	7	4
Foot orthosis	Per Pair	1,500	5	5
Contractures splints (Life Long)	Ankle support (per pair)	750	2	11
	Wrist support (per pair)	700	2	11
Dynamic Movement Orthosis (DMO)		12,000	5	5
Total (inclusive of renewals)		387,700		

Dr Khor

Category	Items	Estimated Cost (RM)	Product Life span (years)	Number of Renewals
Tilt in space wheelchair	Seating system inclusive of head, trunk and pelvic support with butterfly harness	3,750	5	5
Standing frame		3,700	5-10	5
Positioning devices	Wedges, rolls and mats	5,000	10	3
Bilateral ankle foot orthosis		1,300	2	11
Shower/ Commode chair		3,000	5	5
Total (inclusive of renewals)		81,550		

[112] There is some overlap between the rehabilitation machines, appliances and equipment recommended by Associate Professor Dr Lydia (PW3) and Dato' Dr Bains (PW4). Counsel for the plaintiffs submits that Associate Professor Dr Lydia's (PW3) and Dato' Dr Bain's (PW4) as shown in the merged Table 1 below should be allowed:

Table 1

Category	Items Cost (RM)	Estimated span (years)	Product Life Renewals	Number of
Positioning seating system	Positioning device	5,000	10	3
	Seating system	5,000	5	5
	Floor seat	4,500	5	5
Wheelchair and accessories	Tilt in space	6,000	5	5
	Wheelchair inserts	1,000	2	11
Orthotic	Bilateral ankle foot orthosis	800	2	11
Contractures splints	Ankle support (per pair)	750	2	11
	Wrist support (per pair)	700	2	11
Activities of daily living aids	Shower/commode chair	400	5	5
	Hoist	5,000	10	3

Standers	7,500	Once a life time	-	
	Velcro straps	350	3	8
	Tilt table	15,000	Once a life time	-
	Velcro	500	3	8
	Walker	9,000	7	4
Therapy aids	Exercise balls	500	2	11
	Exercise mats	500	5	5
	Swings	1,000	5	5
	Toys and Tools	500	Once a life time	-
	Bolster & Form wedges	2,500	5	5
Snoezelen therapy		80,000	Once a life time	-
Dynamic Movement Orthosis (DMO)		12,000	5	5
Total (inclusive of renewals)		376,550		

[113] Based on the above, counsel for the plaintiffs submits that Nurul Husna should therefore be awarded the sum of RM376,550 under this head of damages.

[114] Counsel for the defendants submits that Nurul Husna being a child of a government employee (PW1), is entitled to free medical equipment when they are recommended by a government doctor. Counsel for the defendant submits that PW1 can buy the equipment first and then seek reimbursement of the cost from the government. Thus, defendants' counsel submits that under this head of claim, the equipment recommended by Dr Sharon Anne Khor can be bought by PW1 and then a claim for reimbursement be made to the government. Therefore, counsel of the defendants submits that there should be no sum awarded under this head.

[115] For reasons discussed much earlier, I am unable to accept that contention. The fact that PW1 may be entitled under the terms of her service of employment with the government for free medical equipment approved by a government doctor would not exclude the rights of the first plaintiff from seeking compensation in this action. Whether the government pays the cost of the equipment now or later is of no consequence to the present determination, the bottom line is still that the government being vicariously liable for the tortfeasors will have to pay for it. So long as there are safeguards

against double claim, the issue that remains to be determined is the type and quantity of equipment that is to be allowed. In this regard, I allowed all the cost of the equipment in Table 1 above with the exception of the following items:

(i) Tilt table;

(ii) Velcro;

(iii) Walker;

(iv) Snoezelen Therapy; and

(v) Dynamic Movement Orthosis.

[116] The result of this is that the total cost of equipment and its renewal that was allowed came to the sum of RM260,050.

Medication, Syringes And Gauze

[117] Nurul Husna will continue to require feeding *via* the gastrostomy tube and will incur the sum of RM300 per month for the feeding tubes, syringes and gauze. Therefore I allowed the sum of RM64,800 calculated based on RM300 per month x 18 years = RM 64,800.

Physiotherapy, Speech And Occupational Therapy

[118] Counsel for the defendant recognises that Nurul Husna will need physiotherapy, speech therapy, occupational therapy and neuro-development therapy. Nurul Husna's mother has given unchallenged evidence of her difficulties in getting such therapy in government hospitals. In fact Dr Sharon Khor (DW1) admitted in court that despite Nurul Husna attending therapy at Hospital Sultan Ismail for more than two years now, a therapy plan has yet to be prepared to Nurul Husna. Therefore, counsel suggests that it is easier to schedule such therapy sessions in private therapy centres to suit the convenience of Nurul Husna's parents and carers. Nurul Husna's mother has been taking her to a private physiotherapy centre in Ulu Tiram which is able to provide therapy on weekends unlike the government centres.

[119] The following rates have been proposed as the cost of such therapy by Dr Lydia (PW3) and Dato' Dr Bains (PW4):

No.		Dr Lydia (RM/visit)	Dato' Dr Bains (RM/visit)	Duration/ Frequency
135.1	Physiotherapy			
	- Clinic visit	60 to 100	150	Once a week
	- Home visit		350	Once a month
135.2	Occupational therapy	60 to 100	200 to 500	Once a week
135.3	Speech therapy	80 to 160	300 to 500	Once a month

[120] In the circumstance, counsel for the plaintiffs submits that the following sums should be awarded for therapies:

	RM	
a. Physiotherapy		
RM150 per visit x once a week x 22 years	158,400	
b. Home visit by physiotherapist		
RM350 per visit x once a month x 22 years	92,400	
c. Occupational therapy		
RM200 per visit x once a week x 22 years	211,200	
d. Speech therapy		
RM300 per visit x once a month x 22 years	79,200	
Total		541,200

[121] Counsel for the defendants submits that the rates given by Dr Lydia are more reasonable. As such I have adopted the rates proposed by Dr Lydia and allowed the following claims under this head:

	RM	
a. Physiotherapy		
RM100 per visit x once a week x 18 years	93,600	
b. Home visit by physiotherapist		
RM200 per visit x once a month x 18 years	43,200	
c. Occupational therapy		
RM100 per visit x once a week x 18 years	93,600	
d. Speech therapy		
RM160 per visit x once a month x 18 years	34,560	
Total		264,960

Botox Injections

[122] It is not denied that Nurul Husna had in the past received botox injections to reduce the spasticity of her muscles. Counsel for the plaintiffs submits that the cost of future Botox injections should be allowed and included as a part of the award of damages for future medical treatment and hospital admissions. Counsel for the defendants on the other hand argues that no such expense be allowed as this treatment is available free of charge at government hospitals. I would not, for reasons discussed earlier, be able to

accept defendants' counsel's contention. In this regard I would allow this claim as part of the lump sum award for cost of future medical treatment and hospital admissions.

Medical Treatment And Hospital Admissions

[123] Once again counsel for the defendants submits that no award of damages be made under this head as Nurul Husna can obtain treatment in the government hospitals free of charge. Again for reasons that I have discussed above, I accept the arguments of counsel for the plaintiffs that provisions for Nurul Husna's future medical needs ought not be hinged onto her mother's present contract of employment with the government nor to the prevailing policies of the government or the vicissitudes of policy changes and the charity of others. The experts recognise that Nurul Husna will need regular and frequent multi-disciplinary out-patient consultations. She is readily susceptible to infection. Counsel for the plaintiffs proposes a sum of RM7,000 per year as reasonable estimate under this head of damages. Whilst recognising that these are reasonably foreseeable expenses, I have reduced the amount claimed to RM5,000 a year for 18 years of purchase, thus totalling RM90,000. I also allowed the sum of RM30,000 as cost of future surgery as there is evidence showing that there is great likelihood of Nurul Husna needing surgical intervention for her hip dislocation and muscular contractures. Thus the total award under this head is RM120,000.

Additional Cost Of Holidays

[124] I have earlier recognised and allowed the sum of RM1,000 per year for additional cost of holidays that would be occasioned for various reasons discussed earlier. Again I allowed this head of claim for 18 years for a total of RM18,000.

Other Heads Of Claim

[125] The other heads of claims for cost of respite care, education of caregivers, future pain and suffering, Nurul Husna's education, accommodation and living expenses in adulthood, and financial planning services were disallowed.

[126] Thus the total award of damages would be as follows:

(i)	Special damages	RM345,031.90
(ii)	Pre-trial damages	RM151,330
(iii)	General damages pain & suffering	RM350,000
(iv)	General damages – future care	RM1,840,610
	Total	RM2,686,971.90

Interest and cost

[127] Interest on the various heads of damages was awarded as follows:

(a) Interest on the special damages was fixed at 4% per annum from date of incident;

(b) Interest on pre-trial damages was at the rate of 5% per annum from date of filing of the writ;

(c) Interest on damages for pain and suffering was fixed at 5% per annum from date of writ; and

(d) Post-judgment interest from the date of admission and recording of liability was fixed at the rate of 5% per annum.

After hearing submissions on cost, I fixed cost at RM213,864.

[128] I further ordered that by virtue of provisions being made in the judgment for Nurul Husna's cost of future care, the second plaintiff would be precluded from making any claims for medical treatment or equipment for Nurul Husna from the government by virtue of her terms of employment. I also ordered that the award of damages, interest and cost be paid to Nurul Husna's parents as trustees for Nurul Husna.